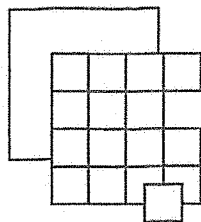

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May 3, 2016

Jim Smith, Esq.
City Attorney
City of Mesa
Mesa, Arizona 85201

Re: City Council Discretion to Evaluate Divot Partners Proposed Development of a Portion of the Red Mountain Ranch Golf Course.

Dear Mr. Smith:

This firm, together with Jeff Gross with Berry & Riddell, represents Divot Partners in connection with the planned development of a small portion of the Red Mountain Ranch Golf Course. As noted in prior materials delivered to you, the driving range portion of the golf course is currently zoned RS-9 and is the location of the proposed single-family, detached, custom home subdivision. This letter is meant to supplement these prior materials and share with you our thought on the issue of whether the Mesa City Council has discretion to deny a Site Plan for the property, when that Site Plan is consistent with the applicable development standards.

We are hopeful that we can work out our differences without the need for litigation. However, should the City deny the proposed Site Plan which we will shortly submit to the City, the owners of the golf course will be forced to sue the City, not only to have the arbitrary action set aside, but for damages from any delay caused by the wrongful denial.

I. Introduction.

Divot Partners plans to develop the driving range portion of the Red Mountain Ranch golf course property with single-family, detached, custom homes. The property is currently zoned RS-9 (DMP), and has been designated as such for several decades. Divot Partners believes it already has met or exceeded all of the standards imposed in the zoning ordinance for development of the property as RS-9. The architecture and design of the homes will be custom in nature and thus they will also meet or exceed the City's requirements.

We acknowledge that the City has the ability under the zoning ordinance to review Divot Partners' Site Plan. While we fully expect that Mesa Planning Staff (including the City Council)

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will have some feedback, those suggestions must be based on specific authority in the Site Plan review provisions in the zoning ordinance and not on vague, unenforceable or non-existent standards that go far beyond the City's legal authority. As explained below, the City does not have the power to prevent the use by rejecting the Site Plan or so diminishing the owner's rights under the RS-9 development standards that the project becomes unfeasible or cost prohibitive.

A. The City's Administrative Authority to Approve or Reject a Site Plan Must be Exercised Within the Limits of the Zoning Ordinance.

As I am sure you are aware, approval of a Site Plan is an administrative act that involves the application of established criteria to existing facts. *See, e.g., Pacifica Com. v. City of Camarillo*, 196 Cal. Rptr. 670 (Cal. App. 1983). Unlike a legislative decision, an entity acting in an administrative capacity does not have the ability to exercise discretion if the criteria are satisfied. The criteria must be objective and have sufficient standards to guide the administrative body and to enable landowners to know their rights. *See M Ghent v. Planning Comm.*, 594 A.2d 5 (R.I. 1991) ("Adequate, fixed and sufficient standards of guidance for the commission must be delineated in its regulations so as to avoid decisions, affecting the rights of property owners, which would otherwise be a purely arbitrary choice of the commission); *Cope v. Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Southern Co-op Dev. Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983).

Furthermore, the City cannot deny the Site Plan based on its effect on the surrounding property, since that decision was already made in fixing the zoning, and on the practical side the proposed project is not adjacent to any current homes. Designation of a permitted use "establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values or the general harmony of the district." *See TLC Development, Inc. v. Town of Branford*, 855 F. Supp. 555 (D. Conn. 1994) (emphasis added). Nor may the City consider public opposition to the use as a reason to deny the Site Plan. *See East Lake Partners v. City of Dover*, 655 A.2d 821 (Del. Sup. Ct. 1994).

A good discussion of the application of these concepts in the Site Plan context is found in *TLC Development, Inc. v. Town of Branford.* In *TLC*, the property owner submitted a site plan for a 152,000 square foot shopping center that was a permitted use on the property under the zoning regulations. The town rejected the site plan because of concerns over increased traffic and inadequate parking, and the owner sued. The court first reiterated the general rule that if the site plan satisfies the zoning regulations, the zoning commission "has no discretion or choice but to approve it." *Id.* at 855 F. Supp. at 557.

The court then noted that the city could not reject the site plan based on characteristics associated with the use, since the town had already determined the use was permitted. The Court said:

> By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use

> based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district. Nor can the town deny approval of a Site Plan on the basis of factors which might only justify its modification.

855 F. Supp. at 558 (emphasis added).

The *TLC* court specifically ruled that the city acted unlawfully by denying the site plan based on its size, because the commission acknowledged that the size was within the zoning specifications. *Id.* Because the city attempted to deny the site plan based on the use, rather than the merits of the plan, the *TLC* court ruled that the commission acted arbitrarily and violated the landowner's due process rights.

This ruling is consistent with the law across the country for site plans and analogous subdivision plats. For example, in *Vick v. Board of County Commissioners*, 689 P.2d 699 (Colo. App. 1984), the county denied a subdivision plat, even though it satisfied all technical legal requirements. The county rejected the plat because of insufficient access, increased traffic noise, and the owner's refusal to dedicate an access easement to nearby wilderness land. The county also found that the plat was incompatible with the surrounding area. The court found that these reasons were arbitrary, capricious and an abuse of discretion because they "can only be described as vague and as having no foundation in any resolution or regulation."

Moreover, in *Carlson v. Town of Beaux Arts Village*, 704 P.2d 663 (Wash. App. 1985), a subdivision plat was denied because it created an "irregular building site" that was inconsistent with the surrounding area, even though the lot met the minimum size requirements. Holding that the town was limited to applying existing land use restrictions, the court found that because no ordinance prohibited irregularly shaped lots, denial based on such a vague standard would put the owner "in the predicament of having no basis for determining how they could comply with the law." Consequently, the *Carlson* court ruled that the action was arbitrary.

As previously shared with you, Mesa Planning Staff indicate that they will recommend denial because of vague standards that are associated with the already approved use or other factors that are inappropriate when reviewing a Site Plan. As the wealth of case law makes clear, rejection on these grounds would be arbitrary, capricious and an abuse of discretion for two reasons: (1) the City cannot deny the Site Plan based on the proposed use, and (2) the City cannot deny the Site Plan based on vague standards.

1. The City Cannot Deny the Site Plan Based on the Approved Use.

First, Site Plan approval is not a legislative act, and even though the City Council will be the final reviewing body, the only discretion it will have is to decide if the Site Plan satisfies the standards in the zoning ordinance, not if the use is acceptable. As discussed in the prior letter, the underlying zoning allows the use. Whether we call the review standard "administrative" or "ministerial," the City can only review the Site Plan under the regulations applicable to site plan

review, and cannot reject the Site Plan based on reasons that have to do with rezoning, such as permitted uses or density. Otherwise, the City would in effect be changing the zoning of the property without going through the mandatory notice and hearing process required by Arizona law. *See* A.R.S. §§ 9-462.01 through 9-462.04.

To the extent either Planning Staff or City Council may not want to see homes on the property, that zoning decision was made long ago. The City may not revisit that decision in the context of Site Plan review. Moreover, should the City take any action that would adversely impact the underlying zoning, Divot Partners would have a Proposition 207 claim against the City for the resulting diminution in the value of the property.

2. The City Cannot Deny the Site Plan Based on its Subjective Definition of "Fit" When all Other Zoning Regulations are Satisfied.

Our client's proposed Site Plan meets all zoning setbacks, coverage requirements and size limits. Despite this fact that the Divot Partners subdivision is legally located on the driving range portion of the golf course and does not back up to any other homes that are located adjacent to the fairways, some in the Planning Staff have suggested that it does not "fit" and its removal of "golf course area" warrants the Site Plan's denial. These concerns/opinions are misplaced because the size of the lots, setbacks, and coverage criteria that dictate the layout of the proposed subdivision were already decided in the zoning ordinance. As in *TLC Development, Inc. v. Town of Branford*, the City cannot effect a legislative zoning change in an administrative Site Plan approval. Yet, this is exactly what Divot Partners is concerned will happen if the Council attempted to change the Site Plan by suggesting that the setbacks were not adequate or that the building heights were too tall or the lots need to be larger. Setbacks, building heights and lot sizes are zoning elements, and cannot be modified administratively. As in the *TLC* case, rejection of the Site Plan on this ground would be arbitrary and unlawful.

Furthermore, any argument toward the concept of "fit," which is not codified in the zoning ordinance, is unenforceable because it gives the City, acting in an administrative capacity, unfettered discretion to decide what "fit" it will accept. Likewise, Divot Partners has no idea how to comply with this unspecified "standard." Divot Partners should not be forced to spend substantial time and expenses preparing and submitting successive plans, guessing what will "fit" on the site under staff's undefined criteria. This is exactly why courts require administrative decisions to be guided by specific and objective standards. In this case, the City has already decided how a building must "fit" on the site through the setbacks, coverage limitations and size restrictions in the zoning ordinance. Staff must apply those standards, which everyone agrees Divot Partners meets, in assessing the Site Plan.

As you know, the City of Mesa Zoning Ordinance sets for the review criteria for site plans in Section 11-69-5(A), wherein its states that the Planning Director and the P&Z Board are guided by ten (10) specific criteria, of which this proposal fully satisfies. We note that in Section 11-69-5(C), there are seven (7) possible conditions of approval that may be used to ensure land use

compatibility during site plan review. It would be contrary to the already established setbacks, heights and other development standard criteria within the RS-9 district to impose additional limitations on this proposed project. Stated differently, if the P&Z Board or the City Council impose additional restrictions on this project above and beyond those standards already set forth in the RS-9 zoning district, such would be an arbitrary and capricious action well beyond the City's authority under this section of the Zoning Ordinance. Additionally, we believe that many of the review criteria are vague enough that specific enforcement of them would be difficult at best especially given the varied nature of prior approvals by the City.

For these reasons, we believe a court would find denial of the Site Plan because of the City's unwritten interpretation of the project's "fit" on the parcel to be arbitrary and capricious action.

B. Golf Course Restriction on Remainder of Course

We note that the question has been posed from the City Staff whether Divot Partners will agree to a restrictive covenant that the remainder of the Red Mountain Ranch Golf Course will remain golf course. As discussed above, the City does not have the power in the context of administrative site plan review to compel Divot Partners to impose such a covenant on its property as a condition of approval, or to deny approval based on Divot Partners' failure to agree to such a condition. Further, and as you know, local governments are limited in what they can require as a quid pro quo for land use approval, especially when it comes to dedications. We would kindly remind you that Arizona law requires cities to comply with the United States Supreme Court decisions in *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those cases, the Court held that cities must establish a "rough proportionality" between the exaction and the needs created by the development to justify their demands.

Dolan is similar to this case. In *Dolan*, the city required the landowner to dedicate property as a greenway for a permanent recreational easement as a condition for issuance of a building permit. The court found the exaction unlawful because the need for the greenway was not caused by the development:

> If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere ... But that is not the case here.

512 U.S. at 394.

Thus, the suggestion to restrict the remainder of the golf course to only "golf course" uses bears no relation to the needs created by the proposed residential use of this 11.43 +/- acre site. It would be absurd to argue, for example, that the increase in traffic justifies any such restriction.

There simply is no nexus between the proposed use and a restriction on the use of the remaining land. In fact, the City did not require this area to be designated "open space" when the final plat for Red Mountain Ranch was being approved, which is an indication that the development did not create a need for this kind of exaction.

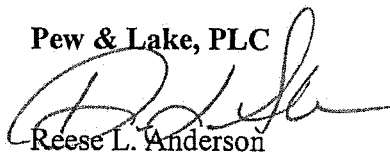
II. Rejection of the Site Plan on the Above Grounds Will Force Divot Partners to Bring a Lawsuit Against the City for Mandamus Relief and Damages.

We believe a court will find that rejection of the Site Plan on the above grounds to be not only arbitrary and capricious action, but also a due process violation. For the former, Divot Partners will be entitled to bring an action to compel the City to approve the Site Plan. For the latter, Divot Partners will also have a cause of action for damages under 42 U.S.C. § 1983. *See Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). Improper denial of the Site Plan would delay Divot Partners' commencement of construction and the selling of lots, which could cause Divot Partners to suffer substantial damages. In either case, Divot Partners would also be entitled to recover attorneys' fees. A.R.S. § 12-2030; 42 U.S.C. § 1988.

Should Divot Partners be delayed in commencing construction and selling lots by the City's improper refusal to approve the plan, the damages will be enormous. Again, Divot Partners cannot stress strongly enough that it sincerely hopes that these issues can be resolved with the City and that litigation, and the expense that the City could unnecessarily incur in fees and costs, can be avoided. We hope the City will respect Divot Partners' legal rights to build this subdivision. However, if the City chooses to ignore Divot Partners' rights, Divot Partners is fully prepared to ask a court to protect its rights in this case and to be fully compensated for any damages it suffers.

Thank you in advance for your assistance with this matter. If you are interested, Jeff Gross and/or I would be happy to discuss these issues with you at a mutually convenient time.

Pew & Lake, PLC



Reese L. Anderson

cc: Jeff Gross, Esq. (Berry Riddell)